Considerations Constitutional Court Of Indonesia Decide Verdict *Ultra Petita*

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ABSTRACT

Basic considerations of the Constitutional Court issued a verdict of Ultra Petita are: (a) philosophical reasons in order to uphold justice and substantive justice, as embodied in the principle of constitutional statehood contained in the NRI Constitutions of 1945, (b) theoretical reasons relating to the authority of the judge to explore, discover, and following legal values that live in the community, if the law does not exist or insufficient legal anymore (obsolete), and (c) legal reasons relating to the provision of Article 24 verse (1) NRI Constitutions 1945 and Article 45 verse (1) of Law No. 24 of 2003 on the Constitutional Court, that Court as organizers aim to uphold judicial justice according to law and the evidence and the judge's conviction. Verdict of the Constitutional Court which is Ultra Petita basically can be accepted, along with the associated principal order and based on the consideration that can be responsible philosophically (it is containing the values of justice, morality, ethics, religion, principles, doctrines). Authority to make verdict that are Ultra Petita for the Constitutional Court can only be given in case of vagueness of legal norms (vague normen) through the method of interpretation of the law, or where a legal vacuum (rechts-vacuum) through legal discovery methods. However, given the interpretation of the law and legal discovery air very subjective nature, so in order to prevent the abuse of power, the authority to make Ultra Petita by the Constitutional Court should be limited by the principles of a democratic state of law, the principles of fair trial and impartial, and the general principles of good state implementation.

Keywords: Verdict *Ultra Petita*, Constitutional Court of Indonesia

INTRODUCTION

Reform movement gained widespread support from all elements of the nation, in among college students, youth, and all other components of the nation, has successfully forced President Suharto to declare his resign from his position precisely on May 21, 1998. Cessation of President Suharto in economic and monetary crisis that is very burdensome life of Indonesian society became beginning of the reform era in the country.

At the beginning of the reform era, developed, and popular in the societies of the demands reforms pushed by various components of the nation, including students, and youth, among others, as given:

1. Amendment Constitutions 1945 of the Republic of Indonesia.
2. Abolition of dual function doctrine Indonesian Armed Forces *(ABRI)*.
3. Maintenance of rule of law, respects of human rights *(HAM)*, and the eradication of corruption, collusion, and nepotism *(KKN)*.

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4. Decentralization and fair relationship between central and local (regional autonomy).
5. Create freedom of the press, and
6. Create democracy.

Demands amendments or changes to the Constitutions of the Republic of Indonesia 1945, hereinafter referred to as the NRI Constitutions 1945, in the reform era is a fundamental breakthrough, because the previous era unwanted changes to the NRI Constitutions of 1945. During its development, the demands amendments or changes in the NRI Constitutions 1945 eventually become a necessity with the Indonesian nation. Furthermore, the demands embodied in a comprehensive, systematic, and gradual change in the NRI Constitutions four times in 1945 through four mechanisms meeting of the People's Consultative Assembly *(MPR)* from 1999 until 2002.

Along with the momentum change during the NRI Constitutions reform in 1945, the idea of the establishment of the Constitutional Court in Indonesia is getting stronger. The peak occurred in 2002 when the idea of formation of the Constitutional Court were included in the NRI Amendment 1945 by MPR as defined in Article 24 verse (2) of the NRI Constitutions 1945, Third Amendment. In the Article 24 verse (2) Third Amendment to the NRI Constitutions 1945 assembly on November 9, 2001, add it institutes a new implementation of the judicial power, the Constitutional Court (hereinafter abbreviated as CC).

Related to the existence of the new Constitutional Court as a judicial institution, implicitly formulated in Article 24 verse (2) of the NRI Constitutions 1945 as follows: *"The judicial power shall be done by a Supreme Court and judicial bodies underneath it in the public courts, religious courts, military courts, administrative courts, and by a* ***Constitutional Court****"*.

To detailing and follow the mandate of Article 24 verse (2) of NRI Constitutions 1945, the Government together with the House of Representatives *(DPR)* discussed the Draft Law *(RUU)* on the Constitutional Court. After discussions conducted with the constitutional mechanism in quite some time, eventually the bill on the Constitutional Court approve jointly by the Government and the Parliament, and then passed in the plenary session on August 13, 2003. On that day, Law on the Constitutional Court was signed by President Megawati Sukarnoputri and given the number of Law No. 24 of 2003 on the Constitutional Court, published in the State Gazette of 2003 No. 98, Supplement to State Gazette No. 4316.

Basic Considerations Constitutional Court Decide *Ultra Petita*

Looking at some of the verdicts of the Constitutional Court, among others verdict in East Java Province Regional Election 2008 and verdict of the General Election of 2008 South Bengkulu and testing verdict Law Against Constitutions of 1945, in this case the verdict of the Judicial Act No. 22 Year 2004 on the Judicial Commission Law *conjunction* No. 4 of 2004 on Judicial Power, acquired some of the considerations underlying these verdicts, namely: (1) in the context of substantive justice and constitutional justice, the sense of justice or fairness petition *(ex aequo et bono)*; (2) Legislation asked to be tested is "the heart" of law, in the sense that as a result of the testing, the resulting whole chapter in the law cannot be implemented, (3) consider the public interest requires the judge should not be confined to the

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petition *(petitum)*; (4) testing laws related to public interest legal consequences are *erga omnes* or the law is unclear.

Based on the identification of the Constitutional Court judgment that is used as a basic for making verdict of *Ultra Petita* in the cases mentioned above, can be simplified there are at least three (3) basic principal considerations. To obtain clarity regarding the three (3) basic considerations of verdict of the *Ultra Petita* described in the following explanations below.

Basic Philosophical Considerations

This philosophical consideration is identified by the inclusion of *subsidiary* application which reads: "If the court is of another, ask fairest verdict *(ex aequo et bono)*". When petitioner filed a petition for justice or fairest decision, it can legally be considered as asking an applicant proposing to the Constitutional Court for grant the requested or exceed the applicant's application. As it known that philosophically, the purpose of law is to justice, in addition to certainty and expediency, therefore the law should truly reflect the philosophical goals, both through legislation and implementation of laws.

In Indonesia, justice is the constitutional rights of citizens, this is reflected in the provisions of Article 28 D verse (1) NRI Constitutions 1945 was formulated, *"Everyone has the right to recognition, security, protection, and fair legal certainty and equal treatment in the presence of law.*". In connection with this, then justice is always in the forefront of every struggle to rise up the rights of citizen and also in the context of law enforcement. Fairness has always be the symbol of the struggle of the people when dealing with the rulers who are robs the normative rights of citizen.

Justice is a term that commonly used in connection between people and the government. Plato argued that: "justice is actually a problem of "pleasure" (convenience) which different or even contradictory between one person and another, finally justice is simply a form of compromise". For Plato justice is the virtue which contains harmony and balance which cannot be determined or explained by rational arguments. Furthermore Plato divides virtues as follows: a) the wisdom or discernment; b) courage or determination; c) discipline, as well as justice. Wisdom is a very necessary element to be considered by the judge when he confronted with the law case which is needed to be resolved.

Verdict of the Constitutional Court which is *Ultra Petita* in the verdict of the dispute of the result of head election of East Java Province seems to be a proof of the use of elementary considerations of justice (substantive justice) to the public as the applicant. This consideration is based on the fact of law that the process of election of Regional Head of East Java Province 2008 was proven beyond reasonable doubt before the court, there has been a violation of a systematic, structured and massive, affecting voice gained candidate Governor and Deputy Governor.

Subsequently, J. Bentham, John Stuart Mill, and David Hume taught that happiness as the purpose of the law is the principle for measuring the justice of law. The existence of the state institutions, including social institutions, and legal institutions should be measured in terms of the benefits, the element of benefit to measure or criteria for a person to obey the law. Further, John Stuart Mill stated: *" ... and the test of what laws there ought to be, and what laws ought to be, was utility* ".The legislation can only be done properly if the fair. Justice is not just a moral imperative, but in fact characterizes the law. Justice is not only legal justice,

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but also social justice.

Employed the basic considerations of justice as a philosophical element, such as seen in consideration in the verdict of disputes of the election of Head of East Java, which is formulated: "the Court to decide *ex aequo et bono* is defined as application to the judge to impose the fairest verdict if the judge has a different opinion than the one requested in petition. As ever written by Gustav Radbruch that: *"Preference should be given to the rule of positive law, supported as it is by due enactment and state power, even when the rule is unjust and contrary to the general welfare, unless, the violation of justice reaches so intolerable a degree that the rule becomes in effect "lawless law "and must therefore field to justice.*" (Preference or reference given by positive law or legislation, which is supported by the implementation of state power, but in practice is unfair and even contrary to the general welfare, even within the limits of justice injure cannot be tolerated, so the rule of law or regulation legislation is to be helpless, then the dimension of justice which should come first, *free translation by writer*).

Given its nature as a constitutional court, the Constitutional Court should not let the rules of procedural justice override and confine the substantive justice, because the legal facts as described in the evidence, it is evident as a constitution violation, particularly Article 18, verse (4) of the Constitutions 1945 which require local elections conducted democratically, and do not violate the principles of elections which are direct, general, free, confidential, honest, and fair as defined in Article 22E verse (1) of the Constitutions 1945.

Furthermore, in the preamble stated that, one of the principles of law and justice which universally adopted stating that "no one should be benefited by fraud and the offense which is done by itself and no one should be disadvantaged by irregularities and violations committed by others" *(nullus / capere commodum nemo potest de injuria sua propria)*. Court should not allow the rules of procedural justice override and confinethe substantive justice.

The equity consideration was based on the provisions of Article 24 verse (1) of the Constitutions 1945 which was formulated: "the power of judiciary is an independent power to conduct judiciary to enforce law and justice" and also the provision of Article 28D verse (1) of the Constitutions 1945, which is formulated:" Everyone has the right to recognition, security, protection, and legal certainty and equal treatment before the law."

Basic Theoretical Considerations

In this section raised on theoretical grounds that the verdict was issued are *Ultra Petita* by the Court, the purpose can be pulled center the theoretical reasons underlying the verdict which is *Ultra Petita,* so theoretically verdict of *Ultra Petita* by Constitutions Court obtain scientific basis or obtain theoretical justification.

In legal scholarly, two influence of tradition *the Civil Law System* and *the Common Law System* is a phenomenon that cannot be denied, even honestly be recognized both the legal system is quite active and effectively influence the development of the legal system for almost all countries in the world. *Civil Law System* is a legal tradition developed in the Continental European countries, while *the Common Law System* is a legal tradition developed in *Anglo-Saxon* countries.

In the tradition of legal scholarly, *Continental Law System*, the establishment of the laws are be done through the tradition of forming formal legislation product, which is formed formally

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by the legislature. The tradition of forming such legislation is put forward based on the principle of legality of legal certainty, which was based on positive law. In the tradition of *the Civil Law System* earnestly tries all matters governed by the Law, so that in the early development of the law equated with the law, the legal validity equated with the validity of the legislation *(rechtmatigheid* similar to *wetmatigeheid)*.

In its relation with *the Civil Law System's* tradition, Bagir Manan said that the countries that are in *the Continental European system* is always trying to draft laws in written form, even in a systematic pursued as possible in a book of law (codification). Systematization of laws in subsequent legislation is known as the codification of the law. Systematization such law is very possible, because the social conditions are tend to be homogeneous to facilitate, compliance, and enforcement the regulation.

In the expansion, *Continental Law System* tradition that promotes law as the sole source of law, gradually recognized the existence of laws that live in the community (the living law), as developed at *Common Law System* in the *Anglo-Saxon system.* This was disclosed by Sirajuddin, the reason for being pressured by the growing needs, while the application of the law by judges getting away from the values of justice, jurisprudence used to overcome weaknesses in the legislation.

According to the paradigm of positivism, the rule of positive law is written in a statute or other formal regulations. Law is understood as *"law as what written in the book"* (and never understood as a symptom of living in the community). Law is the determination of the logical linkages between rules and between the parts that exist in the law. Any term used always precisely defined, and easily understood by the public as stakeholders.

Indonesian legal system itself as a Dutch colony, of course, the influence of *the civil law system* cannot be avoided, because the Dutch tried to plant Constitutional Court culture in order to strengthen its power, including in Indonesia, and one of them through the legal system of the country. Therefore, not surprising that most of the Indonesian legal experts have different perceptions of the law itself, not least who see the law is still the law, although it is also not a few who tried to get out of the frame of legislation in seeing the law, including in it the living law.

Interpretively , the provisions of Article 5 verse (1) of Law No. 48 of 2009 on Judicial Power is not an entry point for the use of *the Common Law System* in Indonesia, given the provisions of the article as a basic or legal basis for the use of law to live in the community *(the living law).* Honestly it must be admitted that Indonesia is no longer a country purely adherents *Continental System* which glorifies the law as the legal validity of a deed back. Indonesia adherents the *Mix Legal System*, because in addition to applicable state law or statute law, also apply religious law, customary law, as well as customary law. Even in some cases, customary law, as the law of life in the community (the living law) is often set aside the rule of law statute (state law).

Maintaining the law is similar to denial of the facts and the reality of plurality of Indonesian society. Pluralism is as a feature of Indonesian society and the nation must be recognized and a form of recognition as one of the way to accommodate the rules of life in society. Because the rules which live in society are part of the culture of the people who once described how the behaviors that exist in it, including customary rules and practices applicable.

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Inability of positive law to meet the demands of the legal needs of people who due to the nature of the rigid, formal, and closed causes un-free implementers of law (judge) in carrying out justice to uphold the law and justice. Inability of positive law causes some of the academicians, and practitioners tried to get closer to the other schools of law, that is the empirical law. Even some are finding the real world of law at this school of law. Oliver Wendell Holmes argued that a lawyer must understand that the symptoms of life as realistic, laws are not always neutral or free value. Law has relevance with other elements, not sterile of non legal elements, including the circumstances and conditions in which the law applies.

Rely on the opinion above, so it can be said that the law is a symptom which live in a society, the law is not only what is written in the book of the law, but the law also must be interpreted also as a pattern of behavior that is maintained by the community. Therefore, it is not wrong that Satjipto Rahardjo stated, law is not a law that is completed, outside the law there are still other law, that is the law which alive and kept in the community.

Basic Juridical Considerations

As we know that the teachings of triad politics, state power is divided into three (3) separate power, the legislative power, executive power, and judicial power, along with the checks and balances mechanism. The purpose of the dividing power is intended to prevent the accumulation of state power that can deliver the absolutism of government, which according to Lord Acton, *power tends to corrupt, but the absolutely power absolutely corrupts*.

In the state of law, every organ or state agency formation is always accompanied with the authority set out in legislation. It is intended to define the scope of authority, the basic use of the authority, as well as the limits of the authority of the institution or state organ concerned. This arrangement is also intended to provide basic legality of the use of the authority of state organs concerned, so any use of authority can be controlled by its users and guaranteed accountability.

Juridical basis of power of judicial authority, which is hereinafter referred as the judicial authorities, in Indonesia constitutionally stipulated in the provisions of Article 24 verse (1) NRI Constitutions 1945 was formulated, "Power judiciary is an independent power to conduct judiciary to enforce law and justice".

Under the provisions of Article 24 verse (1) stated that the judicial authority is an independent power, with the purpose of enforcing the law and justice. In the context of implementing judicial authorities, the Constitutional Court in the judicial conduct, also aims not only enforcing the law, but also justice. In the context of justice itself, that the Constitutional Court is more focused on the goal of substantive justice rather than procedural justice, on the grounds that legal justice is not always related to the provisions of the formal-procedural. Paradigm which id adopted by the constitutions judge in the Constitutional Court is in accordance with the duty of judges to always explore the values of substantive justice in society in facing of lawsuits.

In addition, goal, and function of the Constitutional Court is to provide protection of human rights, as enshrined in Article 28D verse (1) of the Constitutions 1945 which reads: "Everyone has the right to recognition, security, protection, and legal certainty as well as treatment equal before the law".

As a follow-up or implementation of the provisions of the rules contained in Article 24verse

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(1) and 28D verse (1) of the Constitutions 1945, set out in Article 45 verse (1) of the Law of Constitutional Court, which reads, "The Constitutional Court decided the case based on the Constitutions of the Republic of Indonesia Year 1945 accordance with the evidence and the judge's conviction. "

Thus Constitutional Court, as an independent judicial authority, to uphold law and justice, and ensure the right of everyone to recognition, protection, and fair legal certainty and equal treatment before the law, so the Constitutional Court, in examining, trying, and deciding cases brought before it, based on *the evidence and the judge's conviction***,** can make the verdict of *Ultra Petita* or exceed the demands of the applicant, along with the applicant's petition begging the fairest decision *(ex aequo et bono).*

CONCLUSION

Basis judgment of the Constitutional Court issued a verdict of *Ultra Petita* is (a) philosophical reasons in order to substantial justice and the principles of statehood which contained in the NRI Constitutions 1945 (constitutional justice), (b) theoretical reasons relating to the authority of the judge to explore, find, and follow the legal values that live in the community, if the law is unclear or has not adequately regulate (obsolete), and (c) as for legitimate reasons relating to the provision of Article 24 verse (1) NRI Constitutions 1945 and Article 45 verse (1) of Law no. 24 of 2003 on the Constitutional Court, that Court as the administration of justice that aims to uphold the law and justice according to the evidence and the judge's conviction.

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